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# Mt. Soledad in the Supreme Court's Crosshairs: Why Legislative Recognition Should Be Considered in Public Displays of Religion

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# Mt. Soledad in the Supreme Court's Crosshairs: Why Legislative Recognition Should Be Considered in Public Displays of Religion

Adrian R. Contreras\*

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## I. INTRODUCTION

Paul Rodriguez took his thirteen-year-old son, Christopher, to a hill in northern San Diego.<sup>1</sup> “This is the most beautiful piece of land in California, if not the country,” said Rodriguez.<sup>2</sup> Breathtaking views surrounded them: the shimmering waters of La Jolla Shores below; the California coastline running to the north; views of Mexico to the south with the city skyline and everything in

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\* J.D., University of the Pacific, McGeorge School of Law, 2009; B.A., Political Science & Spanish, University of California, Davis, 2006. I would like to thank my family for all of their love and support during my years in law school. I would also like to thank the *McGeorge Law Review* staff and editors for their help in preparing this Comment, in particular Corey Ordoñez.

1. Randal C. Archibold, *High on a Hill Above San Diego, a Church-State Fight Plays Out*, N.Y. TIMES, Oct. 1, 2005, <http://query.nytimes.com/gst/fullpage.html?res=9B00E2D71330F932A35753C1A9639C8B63> (on file with the *McGeorge Law Review*).

2. *Id.*

between; and never-ending eastern views of the mountains.<sup>3</sup> Although beautiful, Rodriguez brought his son to the hill for another purpose—to learn about those who had sacrificed for their country.<sup>4</sup>

On top of this prominent San Diego hill sits the Mt. Soledad Veterans Memorial.<sup>5</sup> This memorial, which was created in the 1950s to honor war veterans,<sup>6</sup> consists of a forty-three foot high Latin cross<sup>7</sup> and has sat on government property since its construction.<sup>8</sup> The Cross has placed the memorial in the middle of an epic legal battle, spanning nearly two decades.<sup>9</sup> In 1989, Philip K. Paulson, an atheist, sued to have it removed;<sup>10</sup> since then, the case has been in both state and federal court,<sup>11</sup> with rulings under California law favoring Paulson.<sup>12</sup>

This Comment addresses whether the Mt. Soledad Veterans Memorial satisfies the Establishment Clause in light of the 2005 U.S. Supreme Court case *Van Orden v. Perry*.<sup>13</sup> In the *Van Orden* case, a divided Court upheld the placement of a monolith of the Ten Commandments at the Texas State Capitol. In the plurality opinion, four Justices concluded that the monolith was “passive,” focusing on the monolith’s nature and American history in finding no Establishment Clause violation.<sup>14</sup> In his concurring opinion, Justice Breyer emphasized the physical nature of the monolith, its nonreligious purpose, and its forty-year presence at the site.<sup>15</sup> Proponents of the Mt. Soledad Veterans Memorial contend that *Van Orden* supports the view that certain religious displays are constitutional.

In 2006, Congress passed a law that transferred the memorial to its new owner, the Department of Defense.<sup>16</sup> Afterwards, Paulson sued then Secretary of Defense Donald Rumsfeld, alleging that the Department’s ownership of the memorial violated the Establishment Clause of the First Amendment.<sup>17</sup> Some

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3. *Id.*; SignOnSanDiego Entertainment Guide, Mount Soledad, <http://entertainment.signonsandiego.com/places/mount-soledad/> (last visited Mar. 25, 2009) (on file with the *McGeorge Law Review*).

4. Archibold, *supra* note 1.

5. *Id.*

6. *Id.*

7. ACLU, The Mt. Soledad Latin Cross, <http://www.aclu.org/religion/govtfunding/26524res20060824.html> (last visited Mar. 25, 2009) [hereinafter Mt. Soledad Latin Cross] (on file with the *McGeorge Law Review*).

8. Archibold, *supra* note 1.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. 545 U.S. 677, 681 (2005).

14. *Id.* at 686.

15. *Id.* at 701 (Breyer, J., concurring).

16. See H.R. 5683 § 2(c), 109th Cong. (2006) (“Upon acquisition of the Mt. Soledad Veterans Memorial by the United States, the Secretary of Defense shall manage the property . . .”).

17. Complaint at 18, *Jewish War Veterans of the U.S., Inc. v. Rumsfeld*, 568 F. Supp. 2d 1199 (S.D. Cal. 2006) (No. 06CV1728JAHNLS).

view this prolonged legal struggle as a litmus test for religious displays in public places.<sup>18</sup>

Section II of this Comment discusses the complicated factual and procedural history of the war memorial, spanning from its construction in 1952, to the first lawsuit in 1989, and then to its transfer to the Department of Defense in 2006. Section III reviews Supreme Court jurisprudence—emphasizing three cases, *Lemon v. Kurtzman*,<sup>19</sup> *McCreary County v. ACLU of Kentucky*,<sup>20</sup> and *Van Orden v. Perry*<sup>21</sup>—and the philosophical divisions among the Supreme Court justices. Section IV suggests that if a display is a historical monument or has other historical significance ratified by Congress, this should be a factor a court considers in determining whether it is “passive” under the history component of a *Van Orden* analysis. This section analyzes this new consideration under *Van Orden* to show why the memorial’s transfer to the federal government had more to do with honoring war veterans than establishing religion. Lastly, Part V concludes that the war memorial does not violate the Establishment Clause under *Van Orden*.

## II. THE CONTROVERSY

### A. Development of the Cross Dispute

The relevant property is a hillside terrain in the La Jolla community of San Diego, California. The City of San Diego (the City) once owned the 170 acre parcel, dedicated to public use in 1916 as “Mt. Soledad Natural Park.”<sup>22</sup> The current Cross is the third to have stood on the hill. Private citizens constructed the first cross out of redwood in 1913, which vandals destroyed in 1924.<sup>23</sup> In 1934, a second cross made of wood and stucco replaced the first cross, but a windstorm destroyed that cross in 1952.<sup>24</sup>

In 1952, the San Diego City Council granted permission to construct the current cross (the Cross): a forty-three-foot high Latin cross made of steel-reinforced concrete.<sup>25</sup> The Cross was dedicated on April 29, 1954, to honor Korean War veterans.<sup>26</sup> Since its dedication, Mt. Soledad Veterans Memorial (the Memorial) has not only been a place of reflection, but also a place for weddings

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18. Archibold, *supra* note 1.

19. 403 U.S. 602 (1971).

20. 545 U.S. 844 (2005).

21. 545 U.S. 677 (2005).

22. *Paulson v. City of San Diego*, 294 F.3d 1124, 1125 (9th Cir. 2002).

23. *Id.*

24. *Id.*

25. Mt. Soledad Latin Cross, *supra* note 7.

26. Mount Soledad Memorial Association, About the Memorial, [http://soledadmemorial.com/web/pages/about\\_the\\_memorial.htm](http://soledadmemorial.com/web/pages/about_the_memorial.htm) (last visited Mar. 25, 2009) [hereinafter About the Memorial] (on file with the McGeorge Law Review).

and baptisms.<sup>27</sup> It has received substantial aesthetic additions, including walls and plaques.<sup>28</sup> Despite its designation as a war memorial, some publications, such as maps and travel guides, have referred to the Cross as the “Soledad Easter Cross.”<sup>29</sup> Before the litigation began, no services were ever held at the Memorial on the holidays typically reserved to honor the armed forces, such as Memorial Day or Veteran’s Day.<sup>30</sup> Furthermore, prior to litigation, the Memorial did not have *any* signs or visual aids informing visitors of its purpose.<sup>31</sup> All of these circumstances have led some people to question whether the Mt. Soledad Cross is truly a war memorial, or if it is merely the pre-textual facade of a religious symbol.

### B. The Legal Clash Begins

In 1989, Philip Paulson, a Vietnam veteran<sup>32</sup> and atheist, filed a lawsuit against the City in the U.S. District Court for the Southern District of California, alleging both federal and state Establishment Clause claims.<sup>33</sup> In his complaint, Paulson stated that he was “deeply offended” by the Cross’ presence,<sup>34</sup> which made him feel like an outcast and a second-class citizen in his own hometown.<sup>35</sup> The case was consolidated in *Murphy v. Bilbray*, which considered three religious symbols throughout San Diego County: the Memorial, the Mt. Helix

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27. *Murphy v. Bilbray*, 782 F. Supp. 1420, 1424 n.10 (S.D. Cal. 1991).

28. *See* Paulson v. Abdelnour, 51 Cal. Rptr. 3d 575, 581 (Ct. App. 2006).

Today the memorial consists of six concentric walls capable of holding 3,200 black granite plaques purchased by donors who may have them engraved with the names and photographs of veterans. At the time of the proceedings in the superior court, approximately 1,600 of those plaques were in place honoring service men and women. The plaques include those dedicated to individuals from the United States Army, Navy, Marine Corps, Air Force, Coast Guard and the Merchant Marine. The memorial includes a flagpole and American flag, 23 bollards honoring community and veteran organizations and brick paving stones honoring veterans and supporters.

*Id.*

29. *See* Mt. Soledad Latin Cross, *supra* note 7 (“Every annual publication of the Thomas Brothers Map for the San Diego area from 1954 to 1989—the year the government’s display of the Latin cross was first challenged in court—presented a geographic legal description of the location as the ‘Mt. Soledad Easter Cross.’”); *see also* *Murphy*, 782 F. Supp. at 1437-38 (“[I]t is not surprising that numerous travel guides, road maps, the Yellow Pages telephone directory and even federal government publications refer to the structure atop Mt. Soledad as the ‘Soledad Easter Cross.’”).

30. *See* *Murphy*, 782 F. Supp. at 1437 (“There is no record of the Association, the City or any other organization having sponsored a memorial service or ceremony at the site of the cross on Memorial Day, Veterans Day or any other day between Easter Sunday 1954 and the day on which this suit was filed.”).

31. *Id.*

32. *See* Chris Jenkins, *Cross Fire—War Memorial or Religious Symbol? Mount Soledad Is at the Crux of a Church and State Debate*, SAN DIEGO UNION-TRIB., Aug. 4, 1991, at D-1 (on file with the *McGeorge Law Review*) (stating that Paulson was a former paratrooper who fought in the Tet Offensive).

33. Philip Paulson, *Timeline*, HUMANIST, Nov.-Dec. 2006, at 23 (on file with the *McGeorge Law Review*).

34. *Murphy*, 782 F. Supp. at 1424.

35. *Id.*

Cross, located in a municipal park, and a cross illustrated on the official emblem for the City of La Mesa.<sup>36</sup>

Two years later, District Court Judge Gordon Thompson entered summary judgment for Paulson and issued a permanent injunction against the Cross' presence on the hill.<sup>37</sup> The court found that the commemorative objective of the memorial was merely a pretext and that "[n]o comparable symbols of other religions [were] present to moderate the cross' sectarian message."<sup>38</sup> The ruling was based solely on the California Constitution.<sup>39</sup> The City had thirty days to remove the Cross.<sup>40</sup>

### C. The Failed Sale

After the ruling, the City Council authorized a sale of the 222 square-foot parcel of land on which the Cross stood to a pre-selected private buyer, the Mt. Soledad Memorial Association (the Association).<sup>41</sup> The Association, an organization founded by the American Legion Post #275, La Jolla, California, did not have to compete with other prospective buyers.<sup>42</sup> Because the City's charter required two-thirds of the electorate to authorize the transfer,<sup>43</sup> the City Council put it on the ballot. The local voters approved<sup>44</sup> the land transfer under Proposition F, which asked:

Shall the removal from dedicated park status of that portion of Mt. Soledad Natural Park necessary to Maintain the property as an historic war memorial, and the transfer of the same parcel by The City of San Diego to a private non-profit corporation for not less than fair market value be ratified?<sup>45</sup>

In *Ellis v. City of La Mesa*, the Ninth Circuit affirmed the district court's injunction.<sup>46</sup> Its ruling, like the district court's, only applied California constitutional law: "Federal constitutional issues should be avoided when the

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36. *Id.* at 1422.

37. *Id.* at 1438.

38. *Id.* at 1436.

39. *See id.* at 1438 ("California's Constitution will not permit [the Cross] to continue to stand.").

40. *Id.*

41. Paulson, *supra* note 33.

42. *Id.*

43. *See* Murphy v. Bilbray, 1997 U.S. Dist. LEXIS 23707, at \*22 (S.D. Cal. Sept. 18, 1997) ("Section 55 of the Charter allows for the sale of dedicated park land provided that such change is either 'first authorized or later ratified by a vote of two-thirds of the qualified electors of the City voting at an election for such a purpose.'").

44. Paulson, *supra* note 33.

45. Paulson v. City of San Diego, 294 F.3d 1124, 1126 (9th Cir. 2002) (emphasis omitted).

46. *Ellis v. City of La Mesa*, 990 F.2d 1518, 1520 (9th Cir. 1993).

alternative ground is one of state constitutional law.”<sup>47</sup> The circuit court, “[w]hile not commenting on whether such memorials violate the federal Constitution,”<sup>48</sup> held that merely designating a display as a war memorial did not satisfy the No Preference Clause of the California Constitution.<sup>49</sup> The court looked only at the district court’s decision regarding the display of the Cross, not whether the sale under Proposition F was unconstitutional; the court concluded that “[a]ny issues concerning compliance with the injunction should be decided in the first instance by the district court.”<sup>50</sup>

Afterwards, the City appealed to the U.S. Supreme Court, which denied the writ of certiorari.<sup>51</sup> The City then sold the land,<sup>52</sup> and the parties returned to the district court to enforce the injunction against the Proposition F sale. In 1997, the district court concluded that the City’s primary purpose in selling to the Association was “to save the Mt. Soledad cross from removal and/or destruction.”<sup>53</sup> Because the sale did not include open bidding, it gave “the appearance of preferring the Christian religion over all others,” and because the court assumed that the Association would continue to allow use of the land “as the backdrop for Christian sectarian events,” it found that the Cross promoted and aided Christianity.<sup>54</sup>

The court’s ruling also looked to the size of the plot of land that was sold. It noted that the “small portion” up for sale was only the land directly underneath the Cross, that it was in the middle of a 170 acre municipal park, and that the Cross, located on a hill, was the “focal point” of the park.<sup>55</sup> All of this led the court to conclude that people walking through the park would think that the City was preserving the Cross.<sup>56</sup>

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47. *Id.* at 1524.

48. *Id.* at 1528.

49. *Id.*

50. *Id.* at 1529.

51. *Murphy v. Bilbray*, 1997 U.S. Dist. LEXIS 23707, at \*27 (S.D. Cal. Sept. 18, 1997).

52. The district court ruled that the Cross violated California’s No Preference Clause. *Murphy v. Bilbray*, 782 F. Supp. 1420, 1438 (S.D. Cal. 1991). The City probably sold the land to a private buyer because the No Preference Clause applies to the government, not private individuals. *See Sands v. Morongo Unified Sch. Dist.*, 53 Cal. 3d 863, 883 (1991) (“The Attorney General of this state has observed that ‘[i]t would be difficult to imagine a more sweeping statement of the principle of governmental impartiality in the field of religion’ than that found in the ‘no preference’ clause.” (quoting 25 Ops. Cal. Atty. Gen. 316, 319 (1955))); *see also Paulson v. City of San Diego*, 262 F.3d 885, 895 (9th Cir. 2001) (noting that the Free Speech and Exercise Clauses in the First Amendment of the U.S. Constitution protect private speech endorsing religion).

53. *Murphy*, 1997 U.S. Dist. LEXIS 23707, at \*26.

54. *Id.* at \*29 (quoting *Murphy*, 782 F. Supp. at 1436).

55. *Id.*

56. *Id.*

*D. The City Sells the Land a Second Time*

After the 1997 decision, the City held a second sale of the land, with two changes. First, it increased the parcel of land to a half acre; second, it opened the bidding to more potential buyers.<sup>57</sup> In all, the City received forty-two bids.<sup>58</sup> Although the City expressly stated that it would not require the bidder to maintain the Cross, it also stated that it was soliciting buyers so that the land could be maintained as a war memorial.<sup>59</sup>

A three-member committee assessed the proposals based on the bid itself, the bidder's financial capability both to fund the bid and to maintain a memorial, the bidder's expertise, the bidder's operating plan, the bidder's responsiveness, and "other strengths or weaknesses."<sup>60</sup>

The Association was one of only five bidders that the committee considered.<sup>61</sup> Three bidders—the Association, Horizon Christian Fellowship, and St. Vincent DePaul Management—stated that they would retain the Cross as a war memorial.<sup>62</sup> The National League for the Separation of Church and State proposed a memorial to honor veterans and the Bill of Rights. The Freedom from Religion Foundation proposed a memorial to honor atheists and freethinkers.<sup>63</sup>

Ultimately, the committee recommended that the City accept the Association's bid.<sup>64</sup> A report noted that the Association had a "comprehensive, well thought out proposal," a high price, a strong fundraising ability, and ties to veterans' groups.<sup>65</sup> The City Council unanimously approved the sale.<sup>66</sup>

Paulson sued the City, alleging that the method of sale violated the California Constitution because it favored the Association and because the land that was sold was too small to cure the appearance of preferential treatment.<sup>67</sup> On appeal, the Ninth Circuit ruled that the structure of the second sale gave an unconstitutional "direct, immediate, and substantial benefit in aid" of religion.<sup>68</sup> The court emphasized that those bidders who intended to keep the Cross were at a financial advantage because it would already be on the property at the time of sale; therefore, the bidder would not incur any costs to fulfill the requirement of maintaining a war memorial.<sup>69</sup>

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57. *Paulson*, 294 F.3d at 1127.

58. *Id.*

59. *Id.*

60. *Id.* at 1128.

61. *Id.* at 1127-28.

62. *Id.* at 1127.

63. *Id.* at 1127-28.

64. *Id.* at 1128.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1132.

69. *Id.*



By contrast, potential buyers who wanted to construct a nonsectarian war memorial would have to spend money to remove the Cross and build a different memorial.<sup>70</sup> This, the court reasoned, explained why the Association's bid was higher than the other bids.<sup>71</sup> Additionally, the court ruled that the second sale also violated the California Constitution and left it up to the parties to arrive at a remedy.<sup>72</sup>

The City appealed to the U.S. Supreme Court in 2003, but certiorari was denied.<sup>73</sup> Losing hope that the Memorial would survive, the City began settlement negotiations, including a proposal to move the Cross to a nearby Presbyterian church.<sup>74</sup> On July 27, 2004, City Council Member Scott Peters presented a motion in another effort to sell the land; if the motion failed, the City Council would support a settlement.<sup>75</sup> The motion passed five to three.<sup>76</sup> It was presented to San Diegans as "Proposition K," which asked:

Shall the City be authorized to remove from dedicated park status and sell to the highest bidder a portion of Mount Soledad Natural Park . . . to transfer ownership of the cross to the new buyer who will determine whether to maintain, relocate, or remove the cross or to replace it with another appropriate monument?<sup>77</sup>

Council Member Peters called Proposition K "the fastest way to get to the end of this."<sup>78</sup> However, Proposition K concerned some citizens because of what the buyer might put in place of the Cross and what the judiciary's reaction would be.<sup>79</sup> Accordingly, over fifty-nine percent of the voters rejected Proposition K.<sup>80</sup>

#### *E. A Helping Hand from the Federal Government*

In 2004, Congress and President George W. Bush designated the Memorial, by Public Law 108-447, as a national memorial honoring veterans of the U.S. Armed Forces.<sup>81</sup> Two local members of Congress—Randy "Duke" Cunningham

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70. *Id.*

71. *Id.* at 1133.

72. *Id.* at 1134.

73. *Paulson v. City of San Diego*, 262 F.3d 885 (9th Cir. 2001), *cert. denied*, 538 U.S. 978 (2003).

74. Matthew T. Hall, *New Mt. Soledad Sale Up to Voters*, SAN DIEGO UNION-TRIB., July 28, 2004, [http://www.signonsandiego.com/uniontrib/20040728/news\\_1n28soledad.html](http://www.signonsandiego.com/uniontrib/20040728/news_1n28soledad.html) (on file with the *McGeorge Law Review*).

75. *Id.*

76. *Id.*

77. Proposition K, Sale of a Portion of Mount Soledad Park City of San Diego, Dec. 15, 2004, <http://smartvoter.org/2004/11/02/ca/sd/prop/K/> (on file with the *McGeorge Law Review*).

78. Hall, *supra* note 74.

79. *Id.*

80. Proposition K, *supra* note 77.

81. Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 116, 118 Stat. 2809.

and Duncan Hunter—were influential in the Memorial’s recognition.<sup>82</sup> The public law also called for the City to donate the Memorial to the Secretary of the Interior, where the Secretary would administer the Memorial as a national park.<sup>83</sup>

Initially, the City Council rejected Congress’ offer five to three.<sup>84</sup> Local residents vehemently petitioned for the City Council to reconsider.<sup>85</sup> Subsequently, the City Council rescinded its previous vote<sup>86</sup> and put the matter, Proposition A, on the ballot.<sup>87</sup> Proposition A passed easily in July 2005.<sup>88</sup>

Paulson sued again, and, in 2005, Superior Court Judge Cowett ruled that Proposition A was unconstitutional under California law.<sup>89</sup> The opinion emphasized that the main purpose of the proposition was saving the Cross, which, coupled with donating land to the federal government to save the Cross, violated the No Preference Clause and the prohibition of aid to religion under the California Constitution.<sup>90</sup>

To make matters worse for the Cross’ proponents, Judge Thompson ordered that the Cross be removed in May 2006: “It is now time, and perhaps long overdue, for this Court to enforce its initial permanent injunction forbidding the presence of the Mount Soledad Cross on City property . . . .”<sup>91</sup> If the City did not

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82. Kimberly Edds, *In Calif., Cross Site Stirs Discord: Church-State Separation Is Issue at Mount Soledad Memorial*, WASH. POST, Dec. 6, 2004, at A19.

83. Consolidated Appropriations Act § 116.

84. Edds, *supra* note 82.

85. Although approximately 34,000 signatures were needed, the local effort received over 88,000 signatures for the City Council to reconsider its vote. *Signature Drive Prompts Council to Vote on Mt. Soledad Cross*, 10NEWS, Apr. 19, 2005, <http://www.10news.com/news/4395606/detail.html> (on file with the *McGeorge Law Review*).

86. *Should Mt. Soledad Cross Be National War Memorial?*, 10NEWS, May 18, 2005, <http://www.10news.com/news/4503215/detail.html> (on file with the *McGeorge Law Review*).

87. See CITY OF SAN DIEGO, PROPOSITION A (2005), available at <http://www.sandiego.gov/city-clerk/elections/city/pdf/propa050726.pdf> (on file with the *McGeorge Law Review*) (“Shall the City of San Diego donate to the federal government all of the City’s rights, title, and interest in the Mt. Soledad Veterans Memorial property for the federal government’s use of the property as a national memorial honoring veterans of the United States Armed Forces?”).

88. Matthew T. Hall, *Soledad Cross Measure Wins: Issue Will Still Head to Court*, SAN DIEGO UNION-TRIB., July 27, 2005, <http://www.signonsandiego.com/news/politics/20050727-0036-7n27cross.html> (on file with the *McGeorge Law Review*).

89. *Paulson v. Abdelnour*, No. GIC-849667, slip op. at 28 (Cal. Sup. Ct. Oct. 7, 2005), available at <http://www.signonsandiego.com/news/metro/images/051007soledadruling.pdf>.

Maintenance of this Latin Cross as it is on the property in question, is found to be an unconstitutional preference of religion in violation of Article I, Section 4, of the California Constitution, and the transfer of the memorial with the cross as its centerpiece to the federal government to save the cross as it is, where it is, is an unconstitutional aid to religion in violation of Article XVI, Section 5, of the California Constitution.

*Id.*

90. *Id.*

91. Onell R. Soto, *Judge Threatens Fine to Enforce ‘91 Ruling*, SAN DIEGO UNION-TRIB., May 4, 2006, <http://www.signonsandiego.com/news/metro/20060504-9999-1n4soledad.html> (on file with the *McGeorge Law Review*).

remove the Cross within ninety days, he threatened to fine the City \$5,000 a day until it did.<sup>92</sup>

Much occurred in this ninety-day time frame. First, a three-judge panel of the Ninth Circuit denied the City's request to stay the penalty.<sup>93</sup> Then, the City appealed to Supreme Court Justice Anthony Kennedy in his capacity as Circuit Justice for the Ninth Circuit for an emergency stay.<sup>94</sup> In its appeal, the City had to show a "reasonable probability" that four Supreme Court justices would vote to hear the case, and a "significant possibility" that five justices would vote to reverse Judge Thompson's decision.<sup>95</sup> Justice Kennedy noted that the case was being reviewed by California's Fourth Appellate District, which could have made the district court's injunction moot.<sup>96</sup> Noting that Congress' "evident desire to preserve the memorial" made it substantially more likely that four Justices would agree to review the case, he granted the stay until all the appeals had taken place.<sup>97</sup>

Both U.S. Representative Hunter and San Diego Mayor Jerry Sanders wrote to President Bush to ask for help.<sup>98</sup> Hunter wrote that Paulson, throughout the litigation, ignored "the broader historical context and community support for the memorial in order to make a political point";<sup>99</sup> Mayor Sanders wrote that many residents, not just those with military connections, enjoyed the Memorial.<sup>100</sup>

On July 26, 2006, Hunter, along with local members of Congress, Darrell Issa and Brian Bilbray, introduced H.R. 5683 in the House.<sup>101</sup> This bill was presented "[t]o preserve the Mt. Soledad Veterans Memorial in San Diego, California, by providing for the immediate acquisition of the memorial by the United States."<sup>102</sup> The bill, referring to the Memorial as "multi-faceted" and

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92. *Id.*

93. Onell R. Soto & Craig Gustafson, *Latest Bid in Battle for Cross Is Rejected*, SAN DIEGO UNION-TRIB., June 22, 2006, <http://www.signonsandiego.com/news/metro/20060622-9999-1n22cross.html> (on file with the *McGeorge Law Review*).

94. According to federal statute:

The Chief Justice of the United States and the associate justices of the Supreme Court shall from time to time be allotted as circuit justices among the circuits by order of the Supreme Court . . . . A justice may be assigned to more than one circuit, and two or more justices may be assigned to the same circuit.

28 U.S.C. § 42 (2006); *see also* Mt. Soledad Case Goes to Supreme Court, June 24, 2004, <http://www.stoptheaclu.com/archives/2006/06/24/mt-soledad-case-goes-to-supreme-court/> (on file with the *McGeorge Law Review*) (stating that in 2006 Justice Kennedy was assigned to hear stays out of the Ninth Circuit).

95. Soto & Gustafson, *supra* note 93.

96. San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 126 S. Ct. 2856, 2857 (2006).

97. *Id.* at 2858.

98. Jennifer Vigil & Greg Moran, *President's Aid Sought in Battle to Save Cross*, SAN DIEGO UNION-TRIB., May 12, 2006, <http://www.signonsandiego.com/news/metro/20060512-9999-1n12cross.html> (on file with the *McGeorge Law Review*).

99. *Id.*

100. *Id.*

101. Paulson, *supra* note 33.

102. H.R. 5683, 109th Cong. (2006).

“replete with secular symbols,” included a finding that the Memorial’s “patriotic and inspirational symbolism . . . provide[d] solace to the families and comrades of the veterans it memorialize[d].”<sup>103</sup> The White House also issued a statement supporting the bill.<sup>104</sup> The House of Representatives passed the bill 349-74, and the Senate passed it unanimously.<sup>105</sup> President Bush signed the bill in August 2006 as Public Law No. 109-272, an eminent domain bill.<sup>106</sup>

Back in the courts, the Fourth Appellate District reversed Judge Cowett’s ruling that Proposition A was unconstitutional.<sup>107</sup> In finding that Proposition A was a constitutional transfer of land, the court unanimously concluded that the City would have no control over the land once it was transferred to the federal government; that the City did not use public funds for a religious purpose; and that there was no incentive for the federal government to maintain the Cross after the transfer.<sup>108</sup> In 2007, the California Supreme Court denied review.<sup>109</sup> Because Proposition A was a congressional bill, the U.S. Constitution controlled the dispute.<sup>110</sup>

#### F. *The Controversy Continues*

The American Civil Liberties Union, on behalf of the Jewish War Veterans of United States of America, filed a complaint in federal district court against Donald Rumsfeld, in his capacity as Secretary of Defense,<sup>111</sup> alleging that the

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103. *Id.*

104. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRES., STATEMENT OF ADMINISTRATION POLICY: H.R. 5683—ACQUISITION OF MT. SOLEDAD VETERANS MEMORIAL (2006), available at <http://www.whitehouse.gov/omb/legislative/sap/109-2/hr5683sap-h.pdf> (on file with the *McGeorge Law Review*).

The Administration strongly supports passage of H.R. 5683 to protect the Mount Soledad Veterans Memorial in San Diego. In the face of legal action threatening the continued existence of the current Memorial, the people of San Diego have clearly expressed their desire to keep the Mt. Soledad Veterans Memorial in its present form. Judicial activism should not stand in the way of the people, and the Administration commends Rep. Hunter for his efforts in introducing this bill. The bill would preserve the Mount Soledad Memorial by vesting title to the Memorial in the Federal government and providing that it be administered by the Secretary of Defense. The Administration supports the important goal of preserving the integrity of war memorials.

*Id.*

105. Dana Wilkie, *Senate Votes to Put Mount Soledad Cross in Federal Hands*, SAN DIEGO UNION-TRIB., Aug. 1, 2006, <http://www.signonsandiego.com/news/metro/20060801-1730-cnssoledad.html> (on file with the *McGeorge Law Review*).

106. Press Release, The White House, President Signs H.R. 5683, S. 250, H.R. 3682, and S. 3693, Aug. 14, 2006, available at <http://www.whitehouse.gov/news/releases/2006/08/20060814-4.html> (on file with the *McGeorge Law Review*).

107. *Paulson v. Abdelnour*, 51 Cal. Rptr. 3d 575, 603 (Ct. App. 2006).

108. *Id.*

109. *Paulson v. Abdelnour*, 2007 Cal. LEXIS 1764 (Feb. 21, 2007).

110. See *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1212 n.16 (S.D. Cal. 2008) (“[T]he federal government is not subject to state law . . .”).

111. H.R. 5683 § 2(c), 109th Cong. (2006) (stating that under the bill, the Secretary of Defense would

Memorial violated the First Amendment of the U.S. Constitution.<sup>112</sup> The case was consolidated with another case, *Trunk v. City of San Diego*.<sup>113</sup> The district court granted the defendants' motion for summary judgment.<sup>114</sup> However, considering that the Cross' constitutionality has been appealed before, the controversy appears to be far from over.

### III. IS THE MT. SOLEDAD MEMORIAL AN ESTABLISHMENT OF RELIGION?

#### A. Differences in California Law and Federal Law

Throughout the previous litigation, all of the decisions regarding the Memorial have interpreted California law.<sup>115</sup> This is significant because the substantive differences between the California and Federal Constitutions are part of what make this Memorial case so intriguing.

The First Amendment's Establishment Clause provides: "Congress shall make no law respecting an establishment of religion . . . ."<sup>116</sup> In 1802, Thomas Jefferson wrote that the Clause created "a wall of separation between Church and State."<sup>117</sup> The purpose of the Clause is to prohibit the government from appearing to take a position on religion and from making adherence to a religion relevant to one's standing in the political community.<sup>118</sup> Although the clause expressly applies only to Congress, the City could be sued because the Fourteenth Amendment incorporates the First Amendment, making local governments accountable for First Amendment violations.<sup>119</sup>

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manage the property, with an understanding that the Mt. Soledad Memorial Association would continue to maintain it).

112. Complaint, *supra* note 17, at 18.

113. *Trunk*, 568 F. Supp. 2d at 1202.

114. *Id.* at 1225.

115. See *Murphy v. Bilbray*, 782 F. Supp. 1420, 1427 (S.D. Cal. 1991) ("Because the court holds today that the challenged practices in all three cases violate California's No Preference Clause, it is unnecessary to engage in further analysis under either the California or United States Constitutions.").

116. U.S. CONST. amend. I, § 1.

117. See Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins & Stephen S. Nelson, Comm. Members, Danbury Baptist Ass'n (Jan. 1, 1802), available at <http://www.loc.gov/loc/icib/9806/danpre.html> (on file with the *McGeorge Law Review*).

Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State.

*Id.*; James O. Goldsborough, *If They Truly Wanted to Please God . . .*, SAN DIEGO UNION-TRIB., July 1, 2002, at B7.

118. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 594 (1989).

119. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such

Scholars suggest that the California Constitution is generally broader and more restrictive on church and state matters than the Federal Constitution.<sup>120</sup> The California Constitution includes the No Preference Clause, which guarantees the “[f]ree exercise and enjoyment of religion without discrimination or preference.”<sup>121</sup> It also prohibits granting anything to or in aid of a religion.<sup>122</sup> These provisions have no express federal equivalent. Thus, proponents of the Memorial believe that the federal standard is more accommodating to religion than California’s.<sup>123</sup>

However, the Establishment Clause in the California Constitution<sup>124</sup> has language similar to its federal counterpart, and without “cogent reasons” California courts will construe it like the Federal Establishment Clause.<sup>125</sup> Nevertheless, throughout the two decades of litigation, not a single opinion has held that the Memorial violated either the California or federal Establishment Clauses; indeed, the rulings avoided an Establishment Clause issue by relying on the No Preference Clause and the unconstitutional aid of religion prohibition in the California Constitution.<sup>126</sup> This is relevant because the case now only alleges violations of the Federal Constitution’s Establishment Clause.

## B. The Unpredictability of Establishment Clause Jurisprudence

Although the separation of church and state has long been an issue in the United States, the Supreme Court has struggled to find a test for upholding the Founding Fathers’ intent.<sup>127</sup> One reason why Establishment Clause case law is

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laws.”); see also *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 774 (8th Cir. 2005) (en banc) (stating that the defendant city was sued for an Establishment Clause violation for a Ten Commandments monument in a city park); *Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 986-90 (D.N.D. 2005) (stating that the defendant city was sued for an Establishment Clause violation for a Ten Commandments display on city property).

120. See *Fox v. City of Los Angeles*, 22 Cal. 3d 792, 796 (1978) (“The California Constitution also guarantees that religion shall be freely exercised and enjoyed ‘without discrimination or preference’ . . . . The current interpretations of the United States Constitution may not be that comprehensive.”); *Vigil & Moran*, *supra* note 98 (“The state constitution is more restrictive on church-state issues.”).

121. CAL. CONST. art. I, § 4.

122. CAL. CONST. art. XVI, § 5.

123. *Vigil & Moran*, *supra* note 98.

124. See CAL. CONST. art. I, § 4 (“The Legislature shall make no law respecting an establishment of religion.”).

125. See *Raven v. Deukmejian*, 52 Cal. 3d 336, 353 (1990) (“[C]ogent reasons must exist before a state court in construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution.” (quoting *Gabrielli v. Knickerbocker*, 12 Cal. 2d 85, 89 (1938))).

126. See *Murphy v. Bilbray*, 782 F. Supp. 1420, 1427 (S.D. Cal. 1991) (“Because the court holds today that the challenged practices in all three cases violate California’s No Preference Clause, it is unnecessary to engage in further analysis under either the California or United States Constitutions.”).

127. See Roxanne L. Houtman, *ACLU v. McCreary County: Rebuilding the Wall Between Church and State*, 55 SYRACUSE L. REV. 395, 403-04 (2005) (“As a result of the multitude of tests and opinions stemming from Supreme Court Establishment Clause cases, there have been numerous inconsistencies among the lower

difficult to decipher is because the Court has shied away from announcing any bright-line rules.<sup>128</sup> As courts have recognized, Establishment Clause jurisprudence is in a state of “limbo” or “purgatory.”<sup>129</sup> One reason for the uncertainty is the emerging dissatisfaction with the current rule for reviewing Establishment Clause cases. In 2008, the Ninth Circuit ruled that *Lemon v. Kurtzman* still provides “the general rule” for analyzing cases under the Establishment Clause.<sup>130</sup> Thus, in analyzing the constitutionality of the Memorial, the district court in *Trunk* partly relied on the three-pronged *Lemon* test.<sup>131</sup>

In *Lemon*, the Supreme Court found Establishment Clause violations in both a Pennsylvania law that provided financial support to nonpublic elementary schools by reimbursing textbooks and teachers’ salaries in specified secular subjects and a Rhode Island law providing state funds to supplement salaries at private elementary schools by fifteen percent.<sup>132</sup> The Court announced the rule that for government activity to comply with the Establishment Clause, the activity must (1) “have a secular legislative purpose” (2) whose “principal or primary effect must be one that neither advances nor inhibits religion,” and (3) must “not foster an excessive government entanglement with religion.”<sup>133</sup> The Court concluded that both statutes failed the third prong.<sup>134</sup> The Rhode Island law required the government to examine a school’s records to determine how much of the total expenditures were attributable to secular education and how much were attributable to religious activity.<sup>135</sup> Similarly, the Pennsylvania law gave state financial aid directly to church-related schools.<sup>136</sup>

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courts, as well as a general sense of confusion within society, with respect to the constitutionality of religious displays on public property.”).

128. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 778 (1995) (O’Connor, J., concurring); see also Jordan C. Budd, *Cross Purposes: Remediating the Endorsement of Symbolic Religious Speech*, 82 DENV. U. L. REV. 183, 203 (2005) (“[N]o per se rule of unconstitutionality has been recognized . . .”).

129. *Card v. City of Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008) (quoting *ACLU of Ky. v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005) and *Green v. Bd. of County Comm’rs*, 450 F. Supp. 2d 1273, 1285 (E.D. Okla. 2006)).

130. *Id.* Recall that because the case pertains to a congressional bill, the Federal Establishment Clause is the only constitutional provision at issue.

131. See *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1212 n.16 (S.D. Cal. 2008) (“[T]he federal government is not subject to state law . . .”).

132. *Lemon v. Kurtzman*, 403 U.S. 602, 607 (1971).

133. *Id.* at 612-13.

134. See *id.* at 613-14.

Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion . . . . We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses, for we conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.

*Id.*

135. See *id.* at 620 (“This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant

Since *Lemon*, the Supreme Court has employed the test in nearly every Establishment Clause case,<sup>137</sup> marking a great shift in Establishment Clause interpretation. Nearly twenty years before *Lemon* was decided, Justice Douglas noted that America had a deep history of religious connections and that courts should be wary of discriminating against those who are religious:

We are a religious people whose institutions presuppose a Supreme Being . . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not[,] would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.<sup>138</sup>

Thus, *Lemon* stands in stark contrast to Justice Douglas' remarks.

While *Lemon* may appear to be good law, its future is uncertain. Some of the current Justices' criticism of *Lemon* shows that they seek to diminish its impact. In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, Justice Kennedy's concurring opinion, joined by Justice Scalia, referred to *Lemon*, note as a comprehensive rule, but rather as a mere "guideline" and "signpost" in an Establishment Clause analysis.<sup>139</sup>

Despite its criticism, the Supreme Court has not formed any test to replace *Lemon*. Some courts have suggested other tests, but no one test has sufficed to overrule *Lemon*. Justice O'Connor proposed an "endorsement test," which asks whether a reasonable observer would perceive the display as a governmental endorsement of religion.<sup>140</sup> Others have proposed an exception allowing

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with dangers of excessive government direction of church schools and hence of churches.").

136. *Id.* at 621. The court also mentioned the district court's finding that of the quarter of the state's students that attended private schools, about ninety-five percent attended Roman Catholic schools. *Id.* at 608.

137. One notable case where the court used a different rule was *Marsh v. Chambers*, 463 U.S. 783 (1983). That case pertained to the Nebraska legislature's practice of employing a chaplain to open each legislative session. The court emphasized the unique circumstances of the practice dating back to early American history:

It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.

*Id.* at 790.

138. *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) ("[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.").

139. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring).

140. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 778-79 (1995) (O'Connor, J.,



governmental activity that only incidentally benefits a religion.<sup>141</sup> Justice Kennedy formed the more permissive “coercion test,” which states that the government may not “coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’”<sup>142</sup> Kennedy employed this test in a case involving school prayer, *Lee v. Weisman*.<sup>143</sup> In short, the *Lemon* test, for better or worse, is what the proponents of Mt. Soledad will have to overcome to keep the Memorial as it is now.

C. *Recent Cases Do Not Provide Any Clear Indication for the Memorial's Fate*

In 2005, the Supreme Court missed two opportunities to end the Establishment Clause confusion when it decided *McCreary County* and *Van Orden*. Hence, the confusion persists.<sup>144</sup> In *McCreary County*, the Court affirmed five to four a preliminary injunction requiring the removal of framed Ten Commandment displays in two Kentucky courthouses as Establishment Clause violations.<sup>145</sup> The display, called “The Foundations of American Law and Government Display,” included the Ten Commandments, the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice.<sup>146</sup> Each document contained a statement about its historical and legal significance. The statement for the Ten Commandments read: “‘The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country . . . . [They] provide the moral background of the Declaration of Independence and the foundation of our legal tradition.’”<sup>147</sup>

The displays at issue were actually the revisions of previous displays. Petitioners *McCreary County* and *Pulaski County* first installed large, gold-framed copies of the King James version of the Ten Commandments, including a citation to the Book of Exodus, at their courthouses.<sup>148</sup> In *McCreary County*, the placement of the Commandments responded to an order from the county

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concurring).

141. See *Lemon*, 403 U.S. at 664 (White, J., dissenting) (“That religion may indirectly benefit from governmental aid to the secular activities of churches does not convert that aid into an impermissible establishment of religion.”).

142. *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

143. *Id.* at 599.

144. See David Steinberg, Opinion, *Religious Symbols—A Fight Courts Should Stay Out of*, SAN DIEGO UNION-TRIB., June 29, 2005, at B7 (“These decisions muddled already murky First Amendment waters—and cast further uncertainty on the future of the Mount Soledad Cross . . . . The decisions provide little guidance about the legality of religious symbols on government property.”).

145. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 881 (2005).

146. *Id.* at 856.

147. *Id.* (quoting the comments on the memorial).

148. *Id.* at 851.

legislative body requiring the display to be placed in a "very high traffic area" in the courthouse.<sup>149</sup> In Pulaski County, the Commandments were hung in a ceremony presided over by the county Judge-Executive, who called them "good rules to live by" and who recounted the story of an astronaut who became convinced "there must be a divine God" after viewing the Earth from the moon. The pastor of the Judge-Executive's church accompanied him, calling the Commandments "a creed of ethics" and telling the press that the display was "one of the greatest things the judge could have done to close out the millennium."<sup>150</sup> In each county, the displays were readily visible to people who used the courthouses to conduct civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote.<sup>151</sup>

A month after they were first sued, both counties passed resolutions to change the displays.<sup>152</sup> The second version of the displays, which still included the large framed copy of the Commandments, included eight other documents in smaller frames, each either having a religious theme or excerpted to highlight a religious aspect. The documents were the "endowed by their Creator" passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, "In God We Trust"; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible," reading that "[t]he Bible is the best gift God has ever given to man"; President Reagan's proclamation marking 1983 the Year of the Bible; and the Mayflower Compact.<sup>153</sup>

The Court concluded that both the first and second versions of the display had a predominantly religious purpose because the new statements of purpose were only a litigating position and the resolutions for the second display passed just months earlier were not repealed or otherwise repudiated.<sup>154</sup> Also, there was adequate evidence that the counties' purpose had not changed in the third version, which was the display at issue, because it highlighted the sectarian purpose by surrounding the Commandments with specific references to Christianity.<sup>155</sup> Therefore, the Court affirmed the injunction to remove the display.<sup>156</sup>

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149. *Id.*

150. *Id.*

151. *Id.* at 852.

152. *Id.* at 852-53.

153. *Id.* at 853-54.

154. *Id.* at 871-72 ("No reasonable observer could swallow the claim that the Counties had cast off the [sectarian] objective so unmistakable in the earlier displays.").

155. *Id.* at 857.

156. *Id.* at 858.

In *Van Orden*, decided the same day as *McCreary*, a plurality ruled that a monolith at the Texas State Capitol containing the Ten Commandments did not violate the Establishment Clause.<sup>157</sup> The monolith in dispute was one of seventeen at the Texas Capitol commemorating the “‘people, ideals, and events that compose Texan identity.’”<sup>158</sup> The primary content of the six-foot high monolith was the Ten Commandments display.<sup>159</sup> Above the text of the Ten Commandments, an eagle grasping the American flag, an eye inside of a pyramid, and two small tablets were carved with what appeared to be an ancient script.<sup>160</sup> Below the text were two Stars of David and the superimposed Greek letters Chi and Rho, which represent Christ.<sup>161</sup>

The Court first mentioned the inherent difficulty in applying the Establishment Clause: on the one hand, religion having a strong role throughout American history; and on the other, governmental intervention in religion potentially harming religious freedom.<sup>162</sup> The Court stated that it had sometimes pointed to the *Lemon* test as the governing test for Establishment Clause analyses.<sup>163</sup> Then, the Court mentioned that it had also shown a diminishing reliance on *Lemon*: “[T]he factors identified in *Lemon* serve as ‘no more than helpful signposts.’ Many of our recent cases simply have not applied the *Lemon* test. Others have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test.”<sup>164</sup>

The Court concluded that *Lemon* was not useful with the type of “passive” monolith at issue and, instead, focused its analysis on the monument’s nature and American history.<sup>165</sup> Strangely, the Court neither provided any standard for determining whether a display is passive nor mentioned how passivity is relevant in an Establishment Clause analysis. The Court explained that there was an unbroken history of all three branches of government officially acknowledging religion’s role in American life.<sup>166</sup> The Court recognized the role of God in America’s heritage, noting that religion had been closely identified with American history and that the histories of man and religion are inseparable.<sup>167</sup>

The Court concentrated specifically on the role of the Ten Commandments in American history.<sup>168</sup> The Court’s own courtroom contains a depiction of Moses

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157. *Van Orden v. Perry*, 545 U.S. 677, 681 (2005).

158. *Id.* (quoting Tex. H. Con. Res. 38, 77th Leg., Reg.Sess. (2001)).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 683.

163. *Id.* at 685-86.

164. *Id.* at 686 (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)).

165. *Id.*

166. *Id.*

167. *Id.* at 687.

168. *Id.* at 686-88 (noting President George Washington issued a proclamation making Thanksgiving a holiday to give thanks to God).

holding the Ten Commandments and representations of the Ten Commandments on the doors leading into the courtroom.<sup>169</sup> The Ten Commandments appear at the Library of Congress, the Department of Justice, the Ronald Reagan Building, the District Court and Court of Appeals for the District of Columbia, and the Chamber of the House of Representatives.<sup>170</sup> Although the Court admitted that the Ten Commandments are religious, it maintained that “[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”<sup>171</sup>

The Court distinguished the monolith from the Ten Commandments display in *Stone v. Graham*.<sup>172</sup> In *Stone*, the Court struck down a Kentucky law requiring that a copy of the Ten Commandments be posted on the wall of each public classroom in the state.<sup>173</sup> The *Van Orden* Court concluded that *Stone* was merely the result of concerns that arose from the context of public schools, as opposed to displays in legislative chambers or capitol grounds.<sup>174</sup> In *Stone*, the text confronted students every day, while the monolith at the Texas Capitol in *Van Orden* was more passive.<sup>175</sup>

The petitioner in *Van Orden* had passed by the monolith for years before suing, and the Court concluded that the monolith had dual purposes, “partaking of both religion and government.”<sup>176</sup> Justice Breyer, the fifth vote, emphasized the physical nature of the monolith, its nonreligious purpose, and its forty-year presence at the site.<sup>177</sup>

Both sides in the Memorial controversy consider the cases as a victory for their causes; in *Van Orden*, the Court held that a public display of religion was constitutional, while in *McCreary*, the same Court held that a different public display of religion was unconstitutional.<sup>178</sup> Indeed, after *Van Orden*, courts were still unsure how to use *Lemon* for public displays of religion.<sup>179</sup> One concern has been whether to limit *Van Orden* to its facts so that it is used only for Ten

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169. *Id.*

170. *Id.* at 689.

171. *Id.* at 690.

172. *Id.*

173. *Stone v. Graham*, 449 U.S. 39, 39 (1980).

174. *Van Orden*, 545 U.S. at 691.

175. *Id.*

176. *Id.* at 691-92.

177. *Id.* at 701 (Breyer, J., concurring).

178. Steinberg, *supra* note 144.

179. See *Card v. City of Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008).

Some courts have applied both the *Van Orden* and the *Lemon* analysis in Eagles monument cases. See *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 778 n.8 (8th Cir. 2005) (en banc) (applying *Van Orden*, but then asserting in a footnote that the same decision would result under *Lemon*); *ACLU of Ohio Found. v. Bd. of Comm'rs*, 444 F. Supp. 3d 805, 816 (N.D. Ohio 2006) (using both *Lemon* and *Van Orden*). But see *Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 986-90 (D.N.D. 2005) (using only *Van Orden*).

*Id.* at 1016 n.9.

Commandments displays.<sup>180</sup> The Ninth Circuit appears to have answered that question in the negative, stating that *Van Orden* is to be used in analyzing “longstanding plainly religious displays that convey a historical or secular message in a nonreligious context.”<sup>181</sup>

#### D. Bush Appointees Make Justice Kennedy the Key Vote

The Supreme Court has already hinted that it might agree to hear the Memorial case.<sup>182</sup> The Court’s makeup is thus important to consider, as it may give some insight for the Memorial’s future.

Since 2005, the year both decisions came out, President Bush appointed two justices to the Supreme Court: John Roberts, Jr. and Samuel Alito.<sup>183</sup> Justice Alito’s appointment in 2006<sup>184</sup> may greatly impact the Court when it comes to Establishment Clause jurisprudence. Alito replaced Justice Sandra Day O’Connor, who spent her years on the bench as the high court’s “swing vote.”<sup>185</sup> As a former appellate judge on the Third Circuit, Alito has a record of staunch conservatism regarding hot legal issues, including public displays of religion.<sup>186</sup>

In three cases pertaining to religion that he considered while on the Third Circuit, Alito supported the religious advocate every time.<sup>187</sup> Notably, Alito wrote the majority opinion in *ACLU of New Jersey v. Schundler*, upholding a holiday display with a crèche, a menorah, and a Kwanzaa symbol.<sup>188</sup> That opinion, although generally discussing *Lemon*,<sup>189</sup> relied heavily on two cases pertaining to holiday displays, *Lynch v. Donnelly* and *County of Allegheny v. ACLU Greater Pittsburgh Chapter*.<sup>190</sup> Alito wrote that the display’s constitutionality did not rest

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180. See *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1206 (S.D. Cal. 2008) (“Whether [Mt. Soledad] comes within the *Van Orden* exception is not clear; *Card* dealt only with a Ten Commandments display, and the opinion reflects uncertainty as to the breadth of the exception.”).

181. *Card*, 520 F.3d at 1016.

182. See *San Diegans for the Mt. Soledad Nat’l War Mem’l v. Paulson*, 126 S. Ct. 2856, 2858 (2006) (“Congress’ evident desire to preserve the memorial makes it substantially more likely that four Justices will agree to review the case . . .”).

183. Tom Curry, *Roberts, Alito Help Define New Supreme Court*, MSNBC, June 18, 2007, <http://www.msnbc.msn.com/id/19244921/> (on file with the *McGeorge Law Review*).

184. *Alito Sworn in as Nation’s 110th Supreme Court Justice*, CNN, Feb. 1, 2006, <http://www.cnn.com/2006/POLITICS/01/31/alito/index.html> (on file with the *McGeorge Law Review*).

185. Peter Baker, *Alito Nomination Sets Stage for Ideological Battle*, WASH. POST, Nov. 1, 2005, at A1.

186. See *id.* (“Bush selected a long-standing New Jersey judge with an extensive record of conservative rulings on abortion, federalism, discrimination and religion in public spaces.”).

187. See *C.H. v. Oliva*, 226 F.3d 198, 210 (3d Cir. 2000) (Alito, J., dissenting) (explaining that he would remand to determine if a school discriminated against a student in removing his poster because of its religious content); see also *ACLU of N.J. v. Schundler*, 168 F.3d 92, 95 (3d Cir. 1999) (ruling in favor of a holiday display with several religious objects in a public building); *ACLU of N.J. v. Black Horse Pike Reg’l Bd. of Educ.*, 84 F.3d 1471, 1489 (3d Cir. 1996) (Mansmann, J., dissenting) (indicating that the injunction of student-led prayer at graduation ceremonies should be reversed).

188. 168 F.3d at 94.

189. *Id.* at 97, 105.

190. See *id.* at 99-104 (indicating that at a minimum, the display had to satisfy Justice Kennedy’s

on adding other nonreligious symbols to the display, such as Frosty the Snowman or Santa Claus.<sup>191</sup> He wrote that such a practice would be “profanation, something that the Establishment Clause neither demands nor tolerates.”<sup>192</sup>

At his confirmation hearings, Alito, a Catholic,<sup>193</sup> was asked about his stance on religious liberty, including the *Schundler* case. He answered that the Supreme Court “has drawn some fairly fine lines,”<sup>194</sup> but spoke in support of having a robust public square rather than a plain public square, believing that there is room for such public displays.<sup>195</sup> Although he did not support any “grand, unified theory of the Establishment Clause,”<sup>196</sup> Alito was “bothered” by any theory that draws distinctions which turn on “fine lines.”<sup>197</sup>

President Bush also chose John Roberts as Chief Justice.<sup>198</sup> Roberts took the place of the late William Rehnquist, who repeatedly wrote in favor of religious displays in public.<sup>199</sup> At his confirmation hearings, Roberts noted that *Lemon*’s greatest advantage and disadvantage was its sensitivity to factual nuances.<sup>200</sup> He indicated that he would interpret the First Amendment’s language on religion to mean that “no one should be denied rights of full citizenship because of their religious belief or their lack of religious belief.”<sup>201</sup>

With the Court’s current makeup, those who follow contemporary Supreme Court jurisprudence view Justice Kennedy as the swing vote.<sup>202</sup> The *New York Times* has divided the Court into three “camps”: the conservative camp, joined by Chief Justice Roberts and Justices Alito, Scalia, and Thomas; the liberal camp, joined by Justices Breyer, Ginsburg, Souter, and Stephens; and Justice Kennedy,

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coercion test and Justice O’Connor’s requirement that a reasonable observer would appreciate that the combined display was an effort to acknowledge America’s cultural diversity).

191. *Id.* at 98.

192. *Id.* at 98-99.

193. Baker, *supra* note 185.

194. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 466 (2006) (statement of Samuel Alito).

195. *Id.*

196. *Id.*

197. *Id.*

198. Charles Babington & Peter Baker, *Roberts Confirmed as 17th Chief Justice*, WASH. POST, Sept. 30, 2005, at A1.

199. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. (2005); see also *Van Orden v. Perry*, 545 U.S. 677, 681 (2005) (holding the Establishment Clause allows the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058, 1063 (2001) (Rehnquist, J., dissenting) (stating that he does not believe a six-foot granite monument inscribed with the Ten Commandments in front of the city of Elkhart’s Municipal Building violates the Establishment Clause).

200. *Id.*

201. *Id.*

202. See Jess Bravin, *New Issues, Familiar Battles: Supreme Court Begins Term with Kennedy Again as Swing Vote*, WALL ST. J., Oct. 1, 2007, at A4 (calling Justice Kennedy’s vote the tiebreaking vote).

“hovering in between.”<sup>203</sup> The Court’s division means that, on virtually any divisive issue before it, Justice Kennedy decides what the law is.<sup>204</sup> Indeed, in the 2006 term he was in the majority bloc in all of the twenty-four cases decided by a 5-4 vote.<sup>205</sup> Thus, if the Memorial case goes to the Supreme Court, not only will the lawyers aim their arguments at Justice Kennedy to sway his vote, but even his colleagues on the Court will contend for his support.<sup>206</sup> Kennedy, a Catholic,<sup>207</sup> has shown his disapproval of *Lemon* by proposing a coercion test<sup>208</sup> and siding with the “passive” analysis in *Van Orden*.<sup>209</sup> Thus, at a minimum, any argument should acknowledge Kennedy’s views.

#### IV. APPLYING *VAN ORDEN* TO MT. SOLEDAD

Proponents may argue that the Memorial, like the Ten Commandments monolith in *Van Orden*, is a “passive” display and does not violate the Establishment Clause. As noted earlier, the opinion did not provide guidance on how to determine whether a public display is passive. Although the Supreme Court did not identify what a display must contain to qualify as “passive” under *Van Orden*, Justice Breyer’s concurrence, which courts interpret<sup>210</sup> as the case’s guiding analysis, included the “determinative” factor that the Texas monolith had been displayed for forty years.<sup>211</sup> Similarly, the Memorial had been in place for nearly the same amount of time before Paulson first sued in 1989—thirty-five years.<sup>212</sup> However, assuming the Supreme Court finds that it is passive and conducts a *Van Orden* analysis,<sup>213</sup> this Comment proposes one analytical

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203. Editorial, *The Roberts Court Returns*, N.Y. TIMES, Sept. 30, 2007, <http://www.nytimes.com/2007/09/30/opinion/30sun1.html> (on file with the *McGeorge Law Review*).

204. *Id.*

205. *Id.*

206. See Mark Sherman, *Justice Kennedy Makes a Majority in Term's Close Cases*, LAW.COM, Apr. 10, 2007, <http://www.law.com/jsp/article.jsp?id=1176122644768> (on file with the *McGeorge Law Review*) (“[L]awyers who argue before the Court often aim their arguments at the 70-year-old Californian who, they believe, can be swayed . . . [N]ow you have the chief justice and Justice Stevens . . . contending for the judicial soul of Anthony Kennedy . . .”).

207. Alan Cooperman, *Court Could Tip to Catholic Majority*, WASH. POST, Nov. 7, 2005, at A3.

208. *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 656-79 (1989) (Kennedy, J., concurring in part and dissenting in part).

209. *Van Orden v. Perry*, 545 U.S. 677, 681 (2005).

210. See *Card v. City of Everett*, 520 F.3d 1009, 1018 n.10 (9th Cir. 2008) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .’” (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977))).

211. *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring).

212. *Jenkins*, *supra* note 32.

213. The district court, following the Ninth Circuit case *Card*, applied both *Lemon* and *Van Orden*. See *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1206 (S.D. Cal. 2008) (“Guided by *Card*, this Court concludes the proper approach is to analyze the Mt. Soledad memorial under both the *Lemon* and *Van Orden* tests, then ‘exercise . . . legal judgment to determine whether [the memorial] passes constitutional muster.’” (quoting *Card*, 520 F. 3d at 1017) (omission and alteration in original)).

consideration: if a public display is a historical monument or has other historical significance ratified by Congress, that historical importance or ratification should be a factor that a court considers.

There is ample support for the Memorial's historical significance. San Diego has numerous religious symbols on public land, such as a cross dedicated to Junipero Serra on Presidio Hill,<sup>214</sup> a cross dedicated to Juan Rodriguez Cabrillo, who discovered San Diego Bay,<sup>215</sup> and a synagogue in Old Town San Diego.<sup>216</sup> With such displays, U.S. Representative Bilbray noted that it would be a matter of "common sense, common decency and tolerance" to have the Memorial remain.<sup>217</sup> He mentioned that San Diegans like the Memorial because of its importance to military veterans.<sup>218</sup> Senators Feinstein (D-CA) and Boxer (D-CA) spoke in favor of the Memorial, calling it "a great source of hope and inspiration" and historically important to veterans and San Diegans.<sup>219</sup> Senator Jeff Sessions (R-AL) also suggested that Paulson's real reason for filing the lawsuit was more about personal beliefs than constitutional law, stating, "Mr. Paulson challenged every potential transfer of the property to a private party, revealing that his true objection was not to the city's ownership of the display but to the cross itself—something he personally did not like."<sup>220</sup>

Some might argue that historical recognition from Congress would put a statute of limitations on the Establishment Clause. That is, the only way a display would acquire historical value would be if nobody bothered to challenge its constitutionality when it was created.<sup>221</sup> However, it is possible that a display would convey the same message in the future as it did when it was first exhibited. In the Memorial's case, its message to onlookers is the same now as it was in

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214. See San Diego de Alcala, <http://missions.bgmm.com/sdiego.htm> (last visited Mar. 25, 2009) (on file with the *McGeorge Law Review*) ("On Presidio Hill there stands a large cross on which the following words are written: 'Here Father Serra first raised the cross. Here began the first mission, here the first town, San Diego, July 16, 1769.'").

215. See Cabrillo National Monument, National Park Service, <http://www.nps.gov/archive/cabr/juan.html> (last visited Mar. 25, 2009) (on file with the *McGeorge Law Review*) (discussing Cabrillo's exploration of San Diego); see also Cabrillo National Monument San Diego, <http://www.bestsandiego.com/cabrillo.html> (on file with the *McGeorge Law Review*) (showing the statue with a cross to commemorate Cabrillo's landing).

216. Temple Beth Israel, San Diego County Parks, [http://www.co.san-diego.ca.us/parks/heritage\\_park.html](http://www.co.san-diego.ca.us/parks/heritage_park.html) (last visited Mar. 25, 2009) (on file with the *McGeorge Law Review*) (explaining the synagogue's history as San Diego's first synagogue).

217. 152 CONG. REC. H5422-02 (2006), available at [http://www.house.gov/list/hearing/ca50\\_bilbray/sp\\_060719.html](http://www.house.gov/list/hearing/ca50_bilbray/sp_060719.html) (on file with the *McGeorge Law Review*) (statement of Congressman Brian Bilbray).

218. *Id.*

219. Press Release, Dianne Feinstein, U.S. Senate, Senators Feinstein and Boxer Seek to Preserve Mt. Soledad Veterans Monument (July 27, 2006), available at <http://feinstein.senate.gov/06releases/r-mt-soledad.htm> (on file with the *McGeorge Law Review*).

220. Unanimous-Consent Request—H.R. 5683 (July 27, 2006), <http://thomas.loc.gov/cgi-bin/query/z?r109:S27JY6-0006>; (on file with the *McGeorge Law Review*).

221. See *Gonzales v. N. Township of Lake County*, 4 F.3d 1412, 1422 (7th Cir. 1993) (rejecting an argument that the longer a display is erected, the less violative it becomes).



1954—solemnity for fallen heroes.<sup>222</sup> San Diegans, Congress pointed out, repeatedly voted to keep the Memorial, showing the local sentiment for the Memorial's nonsectarian message about the armed forces.<sup>223</sup> Indeed, events at the Memorial commemorating the military year-round, including holidays such as Memorial Day and Veterans Day, highlight its true purpose to honor war veterans.<sup>224</sup> Therefore, the congressional recognition reflected the Memorial's historical significance.

In addition, Justice Breyer's concurrence in *Van Orden* analyzed whether a display has other elements that suggest a nonsectarian message.<sup>225</sup> Similarly, the Memorial's physical appearance shows that it is more than just a Latin cross.<sup>226</sup> There are "six concentric walls capable of holding 3,200 black granite plaques" that donors can purchase;<sup>227</sup> approximately 2,400 of those plaques are now in place honoring service men and women in the U.S. Army, Navy, Marine Corps, Air Force, Coast Guard, and the Merchant Marine.<sup>228</sup> An American flag flies over the Memorial and its brick paving stones, honoring veterans and supporters.<sup>229</sup> Thus, the Memorial as a whole includes other attributes showing that the message is broader than merely religion.

Furthermore, the fact that the national memorial designation came during a time of war accentuates the Memorial's historical significance.<sup>230</sup> San Diego's vast military presence, from Camp Pendleton,<sup>231</sup> Miramar Marine Corps Air Station,<sup>232</sup> and Naval Base San Diego,<sup>233</sup> along with our nation's involvement in the wars in Iraq and Afghanistan, would certainly explain the vigor with which locals have fought to keep the Memorial as it is. Thus, courts should not assume that lobbying alone persuaded Congress to pass the legislation, as many other

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222. See 152 CONG. REC. H5422-02 (2006), available at [http://www.house.gov/list/hearing/ca50\\_bilbray/sp\\_060719.html](http://www.house.gov/list/hearing/ca50_bilbray/sp_060719.html) (on file with the *McGeorge Law Review*) (statement of Congressman Brian Bilbray calling the Mt. Soledad a war memorial to the 800,000 missing in action in Korea).

223. See Unanimous-Consent Request—H.R. 5683 (July 27, 2006), <http://thomas.loc.gov/cgi-bin/query/z?r109:S27JY6-0006>: (on file with the *McGeorge Law Review*) (stating that seventy-six percent of San Diegans voted in support of the Memorial under Proposition F in 1992).

224. *Id.*

225. *Van Orden v. Perry*, 545 U.S. 677, 701-02 (2005) (Breyer, J., concurring).

226. *Paulson v. Abdelnour*, 51 Cal. Rptr. 3d 575, 581 (Ct. App. 2006).

227. *Id.*

228. About the Memorial, *supra* note 26.

229. *Id.*

230. See Poll: Support for Bush, Iraq War Dropping, CNN, May 22, 2004, <http://www.cnn.com/2004/ALLPOLITICS/05/14/bush.kerry/index.html> (on file with the *McGeorge Law Review*) (noting the impact of war on the political landscape).

231. Fact Sheet, Marine Corps Base Camp Pendleton, <http://www.pendleton.usmc.mil/press/kit.asp> (last visited Mar. 25, 2009) (on file with the *McGeorge Law Review*).

232. Miramar Marine Corps Air Station, <http://www.globalsecurity.org/military/facility/miramar.htm> (last visited Mar. 25, 2009) (on file with the *McGeorge Law Review*).

233. Commander Navy Installations Command, <https://www.cnic.navy.mil/sandiego/index.htm> (last visited Mar. 25, 2009) (on file with the *McGeorge Law Review*).

factors played a part.<sup>234</sup> Congress recognized San Diego's ties to the military, and the timing of the congressional designation shows that preserving a landmark honoring United States troops, not advancing religion, was a motivating factor.

This national memorial designation would not be far-fetched, even if it does recognize a cross.<sup>235</sup> Crosses can certainly have a nonsectarian meaning, especially in war commemorations.<sup>236</sup> Further, some of the Founding Fathers were deeply religious, so religion was not meant to be absolutely barred from American society.<sup>237</sup> Evidence from early American history confirms this, as shown in the Declaration of Independence's references to "God" and "Creator."<sup>238</sup> Indeed, the Supreme Court has recognized that America is a religious country.<sup>239</sup> The California missions,<sup>240</sup> the display of Moses in the Supreme Court chambers,<sup>241</sup> and the Junípero Serra statue in the Capitol<sup>242</sup> are all symbols "partaking of both religion and government."<sup>243</sup>

Some might argue that leaving the Memorial as it is shows intolerance toward those who are not Christian. The Supreme Court must remain aware of the historical significance of separation of church and state, especially in an inherently pluralistic country such as ours.<sup>244</sup> Incidents in Belfast, Sarajevo, and

234. See *Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 879 (9th Cir. 2006) ("Lobbying Congress . . . cannot be viewed as 'causing' subsequent legislation . . . . Attributing the actions of a legislature to third parties rather than to the legislature itself is of dubious legitimacy, and cases uniformly decline to do so.").

235. See Email from Bill Kellogg, President, Mount Soledad Mem'l Ass'n, to author (Jan. 6, 2008, 12:31:00 PST) (on file with the *McGeorge Law Review*) ("Crosses were used all over the world to commemorate war dead so [Soledad's] design was determined to be a fitting way to honor those who died in the Korean War.").

236. See Jenkins, *supra* note 32 (explaining the City's reliance on expert testimony that a cross is resymbolized when used in war commemoration); see also Allison Hoffman, *San Diego Cross May Provide National Legal Test*, SAN DIEGO UNION-TRIB., July 22, 2006, <http://www.signonsandiego.com/news/state/20060722-0842-ca-crossdispute.html> (on file with the *McGeorge Law Review*) ("The cross is the quintessential symbol of fallen soldiers in Western civilization.").

237. Steinberg, *supra* note 144 (suggesting that a per se rule barring any public invocation of religion would have appalled the Framers); Sandi Dolbee, *Are We a Christian Nation*, SAN DIEGO UNION-TRIB., Nov. 25, 1994, at D1.

238. See THE DECLARATION OF INDEPENDENCE para. 1-2 (U.S. 1776) ("We hold these truths to be self-evident; that all men are created equal, that they are endowed by their *Creator* with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." (emphasis added)).

239. Steinberg, *supra* note 144.

240. See Press Release, Cal. Missions Found., California Missions Preservation Act Passes the Senate (Nov. 30, 2004), available at [http://www.missionsofcalifornia.org/feature/hr\\_1446.html](http://www.missionsofcalifornia.org/feature/hr_1446.html) (on file with the *McGeorge Law Review*) ("This Bill will provide \$10 million dollars over five years to the California Missions Foundation for projects related to the physical preservation of the twenty-one California Missions.").

241. Moses Image (with 10 Commandments) Adorns U.S. Supreme Court Building, Aug. 20, 2003, <http://www.freerepublic.com/focus/f-news/967509/posts> (on file with the *McGeorge Law Review*).

242. Junípero Serra at Statuary Hall, [http://www.serraus.org/the\\_serran/mar01\\_c.htm](http://www.serraus.org/the_serran/mar01_c.htm) (last visited Mar. 25, 2009) (on file with the *McGeorge Law Review*).

243. *Van Orden v. Perry*, 545 U.S. 677, 691-92 (2005).

244. Linda Hills, *Separating Church and State*, SAN DIEGO UNION-TRIB., Jan. 2, 1998, at B7 (stating division along religious lines triggers brutal wars in many countries like Ireland and Bosnia).

New York City demonstrate the problems religious intolerance can cause when taken to the extreme.<sup>245</sup> Thus, by following *Lemon*, the Court would ensure that any public displays of religion are more likely to have some secular purpose.<sup>246</sup>

However, the eminent domain bill does not show intolerance for several reasons. First, a closer look at the bill shows that there is no requirement to keep the Cross as part of the Memorial—the only requirement is to maintain Mt. Soledad as a veterans' memorial.<sup>247</sup> Second, even the Court in *Lemon* recognized that the analysis must come from an objective standard, “not from the standpoint of the hypersensitive or easily offended”;<sup>248</sup> there will be cases where society cannot eradicate every display that may have some religious connotation to appease everyone. Third, no one is forced to go to the Memorial for sectarian devotion; the district court noted that “physical access to the cross is blocked by an iron fence. Also, there are no benches immediately adjacent to and facing the cross, nor any other fixtures . . . inviting veneration of the cross.”<sup>249</sup> This differs from the displays in *McCreary*, which were at a courthouse,<sup>250</sup> and *Stone*, which were at public schools, because in those venues, people who had to enter the courthouse or school could not avoid the displays.<sup>251</sup>

Still, the Establishment Clause was expressly intended to protect against congressional action;<sup>252</sup> giving too much weight to Congress would eliminate the Establishment Clause's teeth. However, some legal scholars have suggested giving more deference to the legislature.<sup>253</sup> However, the Court has recognized that “Congress may not legislatively supersede [its] decisions interpreting and applying the Constitution.”<sup>254</sup>

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245. See James McElroy & Linda Hills, *The Mount Soledad Memorial Case-Against-The Constitution Is Clear on Separation of Church, State*, SAN DIEGO UNION-TRIB., Apr. 12, 2002, at B9 (explaining that religion has been the cause of several wars and terrorism).

246. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

247. See *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1209 n.10 (S.D. Cal. 2008) (“If in the future, for example, the cross becomes structurally unsound and must be removed for safety reasons, the statute does not require that it be replaced.”).

248. *Id.* at 1219.

249. *Id.* at 1217. As part of its *Van Orden* analysis, the district court incorporated its earlier discussion of the effect analysis under *Lemon*. *Id.* at 1222.

250. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 850 (2005).

251. *Stone v. Graham*, 449 U.S. 39, 39 (1980).

252. U.S. CONST. amend. I, § 1.

253. See Steinberg, *supra* note 144.

Officials in two Kentucky counties posted the Ten Commandments in their courthouses. Certainly, justices on the Supreme Court have a right to disagree about the value of the project. But these justices, who live and work hundreds of miles away from the Kentucky courthouses, should have the wisdom to defer to others who live and work in the communities.

*Id.*; see also Jason Marques, Comment, *To Bear a Cross: the Establishment Clause, Historic Preservation, and Eminent Domain Intersect at the Mt. Soledad Veterans Memorial*, 59 FLA. L. REV. 829, 871 (explaining that the Court might adopt a per se rule that when a religious display is recognized as a national monument or memorial, a rebuttable presumption of constitutionality results).

254. *Dickerson v. United States*, 530 U.S. 428, 437 (2000).

The Court is free to scrutinize the congressional record for a bad-faith designation or insufficient evidence for such a designation, but to completely ignore the record under *Van Orden* greatly undermines the real possibility that a particular display's historical significance outweighs the religious content. Indeed, given the heated litigation that Mt. Soledad has created over the years, the fact that it passed by relatively wide margins accentuates the secular purpose behind the bill. After all, "Congress is a large, heterogeneous body consisting of members of different religious faiths and, in some cases, no faith at all. It is unlikely such a diverse group would unite to support religious legislation cloaked with a secular agenda . . . ."<sup>255</sup>

## V. CONCLUSION

A *Van Orden* analysis probably will show that the Memorial is constitutional, especially if one considers its historical value as a national monument. The Memorial now has aesthetic additions that highlight its purpose as a war memorial and is the site of ceremonies to honor the armed forces. The Memorial existed for over thirty years before the first lawsuit. San Diego is a city known for its military influence and the memorial designation came while our nation was in an armed conflict. Significantly, the designation received support from both sides of the aisle in Congress and the White House. The Memorial's message is the same now as it has always been—honoring the armed forces.

Considering a display's historical significance as recognized by the legislature would be in line with Justice Kennedy's view in *Van Orden*. Because it is merely a factor to consider, any such designation would not be conclusive. While the *Lemon* test still has useful applications in other Establishment Clause contexts, it has proven to be a more difficult standard to apply in the context of public displays of religion.<sup>256</sup> Although the Supreme Court missed two chances to clarify the Establishment Clause in the latter context with *Van Orden* and *McCreary*, Mt. Soledad provides the Court a chance to form a standard that fulfills the Framers' intent while keeping its proper role in interpreting the Constitution.

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255. *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1210 (S.D. Cal. 2008).

256. See *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring) ("[N]o exact formula can dictate a resolution to such fact-intensive cases.").

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